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Supreme Court, U.S.
FILED

No. 07-454 OCT 01 2007

OFFICE OF THE CLERK

In The

Supreme Court of the United States

KELVIN ELLIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court correctly increased defendant's total offense level by eight levels, pursuant to United States Sentencing Guideline Section 2J1.2(b)(1)(A), based upon a finding that defendant threatened to cause physical injury to a government witness in order to obstruct the administration of justice.

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OPINIONS BELOW

Kelvin Ellis, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 2, 2007. The July 2, 2007, opinion of the United States Court of Appeals for the Seventh Circuit, the judgment of which is sought in this petition to be reviewed, is an unpublished Opinion and is reprinted in the Appendix to this petition at App. pp. 1-9. The prior ruling of the United States District Court, Southern District of Illinois denying the petitioner's Objection to the Pre-Sentence Report, entered is an unpublished bench decision, and is reprinted in the Appendix to this petition at App. pp. 22-28. The judgment in the case was entered on August 3, 2006 and is reprinted in the Appendix to this petition at App. pp. 10-21.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

U.S.S.G. § 2J1.2(b)(1)(A)

Reprinted in the appendix to this petition at App. p. 29.

STATEMENT OF THE CASE

On January 21, 2005 Defendant was charged by Indictment in the Southern District of Illinois with a violation of Title 18, United States Code, Sections 1512(c)(2) and 2 (Count one, attempting to aid and abet obstruction of justice), and with violations of Title 18, United States Code, Sections 1503 and 2 (Counts two and three, endeavoring to aid and abet obstruction of justice).

As part of the factual basis, it was developed that on October 6, 2004, Defendant told his friend, Rudy McIntosh, that the confidential informant had been to the U.S. Attorney's Office and had told federal law enforcement officers that Defendant had been involved in election fraud and other potential crimes. Unbeknownst to Defendant, McIntosh also had spoken to federal law enforcement officers regarding the election fraud and taped this conversation and others thereafter as part of the investigation.[1] During these conversations, Defendant spoke about wanting to "destroy [the confidential informant's] credibility." During these conversations, Defendant suggested planting drugs on the Defendant to destroy her credibility and "get her ass off the street" by putting her in jail. During these conversations, Defendant also suggested obtaining a tape recording of the

[1] Dannita Youngblood also takes part in some of these taped conversations. Youngblood was also working with the Government at the time the tapes were recorded.

confidential informant threatening the life of another woman in order to destroy the confidential informant's credibility.

Defendant never suggested having the confidential informant killed or wanting her killed at any time that Defendant and McIntosh spoke.

During these conversations, it is actually McIntosh who raises the idea of "doing something different" than destroying her credibility and suggests killing the confidential informant. McIntosh even asks Defendant directly, "How far do you want it to go?" and Defendant answers "all the way." Defendant then explains that "all the way" means a possible prostitution charge and confirms that, "I want her credibility destroyed." McIntosh then states, "now, with the – with the – with the credibility thing, it needs to go up" explains "it can be done," and asks "what do you want me to do?" Defendant again confirms that he wants McIntosh to take it as "far as you can take it. I want this bitch locked up."

During a conversation on November 19, 2004, Defendant makes some statements that could be taken as a threat if taken out of context. However, Defendant's intention of only discrediting the confidential informant is clarified with certainty after McIntosh suggests:

> we can dispose of her. I mean, dispose of her. I ain't talking with the crack. I mean, if that's what you want done – when Defendant

states that *"all we need to do is discredit her,* dispose of her." (emphasis added.)

Thereafter, on November 24, 2004, McIntosh informed Defendant that he had killed the confidential informant. He also showed Defendant a staged photograph of the confidential informant set up by federal enforcement to look like the confidential informant had been murdered.

The defendant entered a guilty plea on October 12, 2005. On March 26, 2007 Ellis filed Objections to the Pre-Sentence Report objecting to an eight point enhancement pursuant to U.S.S.G. § 2J1.2(b)(1)(A) which applies if the offense involved causing or threatening to cause physical injury to a person in order to obstruct the administration of justice. Hearings were held on April 7, July 20 and July 27, 2006. On, July 27, 2006, the Honorable Michael J. Reagan denied the objection and ruled that the enhancement was appropriate. Thereupon the defendant was sentenced to 121 months imprisonment as to count one, and 120 months imprisonment as to each of counts two and three, all counts to run concurrently for a total sentence of 121 months imprisonment, 3 years supervised release, a fine of $12,500, and a special assessment of $300. The district court entered its Judgment and Commitment Order on August 3, 2006. Defendant filed a timely Notice of Appeal on August 3, 2006. The Seventh Circuit Court of Appeals affirmed the United States District Court on July 2, 2007.

REASONS FOR GRANTING THE WRIT

The judgment of the Seventh Circuit Court of Appeals should be reviewed by this Court because it has decided an important federal question in a manner which misapplies U.S.S.G. § 2J1.2(b)(1)(A) as well as being a case of first impression for all Federal Districts.

Defendant does not dispute that he is guilty of obstruction of justice or that he made statements (that the Government captured on tape) which show that he intended to obstruct a grand jury investigation by attempting to mar the credibility of a witness. What is in dispute is whether he threatened to have this confidential informant injured or killed. When the conversations are viewed as a whole and read within the context of all the conversations that took place in the Fall of 2004, it is clear that Defendant never threatened to physically harm the confidential informant. He clearly stated on many occasions that the plan was only to "destroy the credibility" of the confidential informant by having her criminally charged with possession of narcotics, prostitution, or for a threat the confidential informant made on tape to kill another woman. Any suggestion of killing the confidential informant came only from the Government's agents. As such, an 8 level enhancement under U.S.S.G. § 2J1.2(b)(1) was unwarranted and was in error. Moreover, the enhancement based upon this alleged uncharged conduct so outweighs the original sentence for the charged conduct as to make it clearly erroneous.

A review of the transcripts without regard to credibility reveals that Defendant *never* threatened to harm the confidential informant at any time. Any suggestion of harming her came from the Government's agents. Moreover, these suggestions were summarily dismissed by Defendant when he consistently reiterated his intention only to discredit her or to "destroy her credibility."

Specifically, Defendant suggested planting drugs on the Defendant to destroy her credibility and "get her ass off the street" by putting her in jail. Defendant also suggested obtaining a tape recording of the confidential informant threatening the life of another woman in order to destroy the confidential informant's credibility. However, he did not threaten to physically harm the confidential informant.

Simply put, there is no point in time during any of the taped conversations that Defendant ever suggested having the confidential informant killed or wanting her killed. Despite the Government's many attempts to bait Defendant into acquiescing to such a plot, evidence that he threatened such action, intended such action, or agreed with such action simply did not exist.

During these conversations, it is actually McIntosh who raises the idea of "doing something different" than destroying her credibility and suggests killing the confidential informant. McIntosh even asks Defendant directly "How far do you want it to go?" and Defendant answers "all the way." Defendant then

explains that "all the way" means a possible prostitution charge and confirms that "I want her credibility destroyed." McIntosh then states "now, with the – with the – with the credibility thing, it needs to go up", explains "it can be done," and asks "what do you want me to do?" Defendant *again confirms* that he wants McIntosh to take it as "far as you can take it. *I want this bitch locked up*" when the conversations are viewed as a whole and read within the context of all the conversations that took place in the Fall of 2004, it is clear that Defendant *never* threatened to physically harm the confidential informant. He clearly stated on many occasions that the plan was only to "destroy the credibility" of the confidential informant by having her criminally charged with possession of narcotics, prostitution, or for a threat the confidential informant made on tape to kill another woman. Any suggestion of killing the confidential informant came only from the Government's agents. As such, U.S.S.G. § 2J1.2(b)(1) simply does not apply. Accordingly, an 8 level enhancement under U.S.S.G. § 2J1.2(b)(1) was unwarranted and was in error.

The Seventh Circuit's reliance on *United States v. Sidhu*, 130 F.3d 644, 652 (5th Cir. 1997) and *United States v. Schnurstein*, 977 F.2d 449, 455 (8th Cir. 1992) is misplaced. In *Sidhu*, defendant Gifford gave numerous medical patients unnecessary injections of morphine and the case did not involve alleged verbal threats against a witness. In *Schnurstein*, the defendant verbally threatened the government witness and the defendant took part in beating the witness. Neither

the Seventh Circuit nor any party to this case could cite any reported cases on point to the facts in this case-that a government agent concocted and escalated a series of discussions which culminated in a fake homicide, because no such cases could be found. In *United States v. Hale*, 448 F.3d 971, 983 (7th Cir. 2005), defendant Hale solicited an individual which resulted in the murder of a federal court judge. Again, the facts in Hale are inapposite to this case.

By the very terms of U.S.S.G. § 2J1.2(b)(1)(A) and the application notes, as well as viewing the actions of the petitioner, the District and Circuit Court of Appeals erred, and the petitioner's claim should have prevailed.

CONCLUSION

For the above reasons, Petitioner Kelvin Ellis respectfully requests that his petition for a writ of certiorari be granted.

Dated: October 1, 2007.

Respectfully submitted,

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NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit Chicago, Illinois 60604

Argued June 13, 2007
Decided July 2, 2007

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 06-3112

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Illinois.
v.	No. 3:05-CR-30011-001-MJR
KELVIN ELLIS, *Defendant-Appellant.*	Michael L. Reagan, *Judge.*

ORDER

While serving as the Director of Regulatory Affairs for the City of East St. Louis, Illinois, Kelvin Ellis became involved in a pattern of corruption that led to separate indictments for election fraud, attempted tax evasion, and, as relevant to this appeal, obstruction of justice. A jury found him guilty of

election fraud, and he pleaded guilty to attempted tax evasion; his two appeals in those cases are pending. *See United States v. Ellis,* Nos. 06-1555 & 05-4677 (7th Cir. arg. Feb. 21, 2007). In this third appeal, Ellis challenges the overall sentence he received after pleading guilty to three counts of obstruction of justice. *See* 18 U.S.C. §§ 1512(c)(2), 1503. Specifically, he argues that the district court erroneously applied an eight-level upward adjustment after concluding that his offenses involved "threatening to cause physical injury to a person." *See* U.S.S.G. § 2J1.2(b)(1)(A). Because the record supports the court's application of the adjustment, we affirm.

In the fall of 2004, federal law enforcement officials were conducting a grand jury investigation into allegations that Ellis had engaged in election fraud. As part of the investigation, they interviewed a confidential informant who told them that she was with Ellis when he paid numerous people, including her, to vote for certain candidates in a primary election. Ellis learned about the informant's cooperation on October 5, 2004, and the next day he told Deputy Police Chief Rudy McIntosh that he wanted "to destroy her credibility." Ellis said that they had to "do what we can to take her ass off the street."

Unbeknownst to Ellis, McIntosh was participating in the investigation and he tape-recorded their October 6 conversation. Over the next six weeks, he taped six more, revealing Ellis's evolving plan for dealing with the informant. On October 7, for

example, Ellis promised to provide the informant's address and license plate number, and when McIntosh asked what Ellis wanted to do, he replied: "Far as you can take it. I want this bitch locked up." On November 19, they had the following exchange:

McIntosh: So what you and I talked about with her before –

Ellis: Mm hm.

McIntosh: – that might twist this whole thing.

Ellis: Oh, tie it up.

McIntosh: Straight.

Ellis: Dead, dead as a motherfucker. Okay.

. . . .

McIntosh: To, to, to derail her, do you want me to go through with adding –

Ellis: Man, I want her ass taken out.

McIntosh: We can, we can, we can talk in front of Danita about it – [unintelligible].

Ellis: Okay.

McIntosh: Do you want me to go to her and, and plant that crack on her?

Ellis: Shit.

McIntosh: Yes or no?

Ellis: I want her ass taken out. And I'll tell you what I tol' you before – however we hafta to do it.

Three days later, McIntosh again tried to discern Ellis's intent:

McIntosh: Well, here's the deal. If we put the crack on her, that's a 10-year thing. But do you want that done, or do you want her out of the picture, because –

Ellis: I don't – I ain't concerned with how. I ain't concerned with what. I'm concerned that this problem go away. You understand what I'm saying?

. . . .

McIntosh: All right. Here it is. We can dispose of her. I mean, dispose of her. I ain't talking about with the crack. I mean, if that's what you want done – I mean, if this don't make the problem go away.

Ellis: All we got to do is discredit her, dispose of her. She needs to be [inaudible].

. . . .

McIntosh: Well, between me, you, and the wall, she going to come up missing, and it ain't going to be on your hands or on my hands. But

you know, I got your word that you going to make me mayor. I'm going to hold you to that one.

Ellis: I'm going to do everything that I can.

The next day, McIntosh told Ellis: "Make sure you're with your girlfriend, wife or somebody. 'Cause she's . . . gonna get knocked tonight." Ellis responded, "Done deal." The next day, during their final taped conversation, McIntosh showed Ellis a picture of the informant in which she appeared to be dead; federal agents had staged a fake murder scene. The two men had the following exchange:

McIntosh: Here's the deal, I've been up all fucking night, they tracked her to an apartment in St. Louis off 70. Done deal, you ain't, listen, listen to me, you ain't got to worry about, if she was the problem, she's dead, if she was the problem, problem gone. Now if she could testify, she going to testify from the bottom of Horseshoe Lake [near East St. Louis].

Ellis: My man.

. . . .

McIntosh: Alright, I'm going to roll out of here, you can keep that one, nah, you keep that one, and,

and, if that was the problem, problem over.

Ellis: Our problem over.

Based on these events Ellis pleaded guilty to one count of obstructing justice by attempting to discredit or kill a government witness. *See* 18 U.S.C. § 1512(c)(2). And because he urged grand jury witnesses to invoke the Fifth Amendment privilege against self-incrimination, he also pleaded guilty to two counts of corruptly endeavoring to influence a witness in a grand jury proceeding. *See id.* § 1503. At sentencing the government recommended that the district court apply an eight-level upward adjustment on the premise that the first count involved "threatening to cause physical injury to a person." *See* U.S.S.G. § 2J1.2(b)(1)(A). Ellis objected, arguing that he intended for McIntosh to destroy the informant's credibility, not to physically harm her. The court, however, found that Ellis's recorded statements, in particular his reaction to the staged-murder photo, "'screams' defendant's intent to do away with a potential witness against him." The court thus applied the eight-level upward adjustment, and sentenced Ellis to 121 months' imprisonment.

On appeal Ellis argues that the district court misinterpreted his recorded statements and thus misapplied § 2J1.2(b)(1)(A). He argues that his statements, viewed in context, show only that he wanted to discredit the informant, and that any suggestion of harming her "came only from the Government's agents." Whether an obstruction-of-justice

count involved a threat of physical injury is a factual question that this court reviews for clear error only. *See United States v. Sidhu*, 130 F.3d 644, 652 (5th Cir. 1997); *see also United States v. Schnurstein*, 977 F.2d 449, 455 (8th Cir. 1992) (whether defendant caused physical injury in connection with obstruction of justice "is factual finding subject to the clearly erroneous standard of review").

The record amply supports the district court's finding that Ellis intended to silence the informant not only by fabricating a criminal case to destroy her credibility, but by having her killed. And contrary to Ellis's assertions, the recorded statements reveal that in several instances it was Ellis, not the government agent, who insisted that the informant should be physically harmed. For example, Ellis used the phrase "dead, dead as a motherfucker" to describe how he wanted McIntosh to handle the informant. And when McIntosh later asked for a "yes or no" answer to whether Ellis wanted him to plant crack on her, Ellis suggested escalating things, answering, "I want her ass taken out . . . however we hafta do it." Moreover, Ellis agreed to procure an alibi for himself when McIntosh said that the informant was "gonna get knocked tonight," and as the district court found, his response to the staged photograph can easily be described as relief. Ellis's statements reveal several circumstances strongly corroborating his intent to solicit murder. *See United States v. Hale*, 448 F.3d 971, 983 (7th Cir. 2005). Specifically, Ellis provided the informant's home address and license plate

number, prepared for the offense by setting up an alibi, and "said nothing to suggest that a misunderstanding had occurred" when McIntosh showed him the staged photograph. *See id.* at 983-84. And even if reasonable minds could disagree over the meaning of Ellis's statements, such disagreement would not establish clear error. *See United States v. Miller,* 159 F.3d 1106, 1111 (7th Cir. 1998).

Ultimately, the district court's conclusion that Ellis planned to have the informant killed rested on a credibility determination. Ellis testified extensively at the sentencing hearing and attempted to provide innocent explanations for his remarks. But the court found his testimony "coy and evasive," and stated that "[a]t times he would torture the meaning of a word or phrase in order to temper it into an innocent construction." A district court's credibility determinations "can virtually never be clear error," e.g., *United States v. Ortiz,* 431 F.3d 1035, 1039 (7th Cir. 2005), and Ellis has pointed to nothing in the record to cast doubt on the court's credibility determination here, let alone to show that it was clearly erroneous.

Ellis also argues that "the enhancement based upon this alleged uncharged conduct so outweighs the original sentence for the charged conduct that the enhancement is clearly erroneous." This argument is meritless. First, the conduct supporting the upward adjustment was charged, and Ellis pleaded guilty to obstructing justice "by attempting to discredit or kill a government witness." Second, because the § 2J1.2(b)(1)(A) adjustment represents only eight

levels out of the total offense level of 27, this is not a case where "the sentencing hearing becomes 'a tail which wags the dog of the substantive offense.'" *See United States v. Morrison*, 207 F.3d 962, 968 (7th Cir. 2000) (quoting *United States v. Corbin*, 998 F.2d 1377, 1387 (7th Cir. 1993)).

AFFIRMED.

United States District Court
Southern District of Illinois

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	(Filed Aug. 3, 2006)
KELVIN ELLIS	Case Number: 3:05-CR-30011-01-MJR
	USM Number: 01943-025
	John J. O'Gara, Jr. Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1-3 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court. _____

☐ was found guilty on counts(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §§2 and 1512(c)(2)	Obstruction of justice: Tampering with a witness, victim or informant	11/24/2004	1
18 USC §§2 and 1503	Obstruction of justice: Influencing a witness in a grand jury proceeding	12/15/2004	2-3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)___

☒ Count(s) 4 ☒ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 27, 2006
Date of Imposition of Judgment

/s/ Michael J. Reagan
Signature of Judge

MICHAEL J. REAGAN,
U.S. DISTRICT JUDGE
Name and Title of Judge

August 3, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

121 Months consisting of 121 months on Count 1 and 120 months on each of Counts 2 and 3 to be served concurrently. This sentence shall run concurrently with the undischarged terms imposed in docket numbers 3:05CR30010 (WDS) and 3:05CR30044(GPM) in the Southern District of Illinois.

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant receive adequate medical treatment.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____

a _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Three years on each of Counts 1, 2 and 3, to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days after being released on supervision and at

least two periodic drug tests thereafter, not to exceed 52 tests in a one year period.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within he first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release. The defendant shall pay the fine in installments of $150 per month or ten percent of his net monthly income, whichever is greater.

The defendant shall provide the probation officer and the Financial Litigation Unit of the United States Attorney's Office with access to any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation. The defendant shall immediately notify the probation officer of the receipt of any indicated monies.

The defendant shall remain current with child support financial obligations.

Absent Court approval, defendant shall not work for any entity that receives, in whole or in part, public funds. The Court is not likely to approve any such employment unless it involves only physical labor or ministerial acts not requiring discretion or spending authority.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$300.00**	**$12,500.00**	**$**

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
TOTALS	$ 0	$ 0	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☒ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments are due immediately, through the Clerk of the Court, but may be paid from prison earnings in compliance with the Inmate Financial Responsibility Program. Any financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of $150.00 per month, or 10% of defendant's monthly net earnings, whichever is greater. The $12,500.00 fine consists of $4,500.00 on count 1, and $4,000.00 on each of counts 2-3 and is due immediately. The $300.00 special assessment consists of $100.00 on each of counts 1-3 and is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	) 05-30011
Plaintiff,	) East St. Louis, Illinois) July 27, 2006
vs.	)
KELVIN ELLIS,	)
Defendant,	)

TRANSCRIPT OF DISPOSITION
BEFORE THE HONORABLE MICHAEL J. REAGAN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Assistant U.S. Attorney By: Hal Goldsmith Nine Executive Drive Fairview Heights, IL
For the Defendant:	O'GARA GOMRIC, et al., By: John J. O'Gara, Jr. 6 East Washington Belleville, IL 62220
Court Reporter:	Barbara Kniepmann 759 Missouri Avenue East St. Louis, IL 62202

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[4] It is as original as we had.

THE COURT: That's my understanding.

The position of the United States and Probation with respect to this objection is that the defendant recruited cooperative witness Rudy McIntosh to ultimately kill a confidential informant who defendant thought was a key witness against him in a federal investigation involving voter fraud. The United States claims the recruitment began as a campaign to initially discredit the confidential informant because of her background as a prostitute and marijuana user, and as the heat of the federal investigation turned up, it escalated to planning to plant cocaine on her and ultimately a temporal relationship existed between the defendant's grand jury appearance and his recruitment of Rudy McIntosh to kill the confidential informant.

The defendant's position is that the words chosen by the defendant on the secret tapes have innocent construction, but mainly that McIntosh was the instigator of this sting and you cannot aid and abet a government agent, which is what McIntosh was. The defendant claims that the tapes support his claim that he wanted the confidential informant discredited, not killed, and that his language and words and conduct were part of the underlying offense and that this enhancement is not warranted.

There is not a significant amount of case law on this [5] particular guideline, but the 8 level increase for threatening physical injury is proper even if the

threat is only implied, as long as it is interpreted to obstruct the administration of justice. That comes from *United States v. Loudan,* L O U D A N, 385, F.3d, 795, a 2004 Second Circuit case.

Additionally, the enhancement does not impose an additional "seriousness" requirement beyond the fact of a violent threat. That comes from the *United States v. Plumley,* 207 F.3d 1086, a 2000, Eighth Circuit case.

Moreover, it is not limited to a case in which the goal is to intimidate witnesses or inflict emotional distress, Seventh Circuit 1991 case, U.S. v. Berkowitz, 927 F.2d 1376.

The defendant need not act with a forward looking specific intent to obstruct justice. For that I cite *United* States v. *Smith,* 387 F.3d 826, a Ninth Circuit, 2004 case.

Additionally, so long as the threat was designed to reach the threatened party, it need not have been made in the threatened party's presence. That is United States v. Grap, 368 F.3d 824, Eighth Circuit, 2004 case.

At this juncture I think a word about credibility would be timely. Although given the standard admonishment regarding perjury, obstruction of justice and making false statements, the defendant chose to testify at the July 20th of 2007 hearing with respect to this particular enhancement. The brunt of his testimony was designed to explain and give innocent

[6] construction to the words and statements seemingly supporting the 2J1.2(b)(1) enhancement.

The defendant's demeanor on the stand can only be described as coy and evasive. At times he would torture the meaning of a word or phrase in order to temper it into an innocent construction. His counsel attempted to pass off some of the terms as vernacularisms. When confronted with words or phrases incapable of innocent construction, his default response was that he was either puffing or lying. But the defendant is not an uneducated man. He chooses his words carefully. He has a masters degree in human services. He has taught communications.

The Court finds his credibility as a witness highly suspect because he dissembled multiple times during his testimony and is a convicted felon three times over, two of which come within ten years of his testimony in this Court. As an example, he testified initially that he did not tell anyone to take the Fifth Amendment, however, very clearly on the November 19th of 2004 tape, he tells everyone who is with him that the only way to protect one another is to take the Fifth. Moreover, he testified that he destroyed the picture that had been staged by the FBI with the confidential informant looking as though she had been killed. He testified that he destroyed that because it had disgusted him, however, on videotape his reaction can only be described as not containing any disdain or remorse, and [7] when he says "My man," and "Our problem is over," it is clear to me that his testimony was inconsistent with his earlier testimony

on the witness stand or his later testimony on the witness stand.

In isolation and in segregation, his responses may be subject to innocent interpretations, but when reviewed in their totality and in context, they support the 2J1.2(b)(1) enhancement. The Court rejects defendant's attempt to fashion a lexicon out of whole clothe and chooses to give the words he uses on the tapes and in the transcripts their plain and ordinary meaning in the context in which they were found.

With that background, the defendant was an active and proactive participant in a plot to discredit an admittedly key potential grand jury witness who would give adverse testimony against him in an investigation regarding vote fraud in the City of East St. Louis. This plot in which he was proactive and not an unwitting participant escalated from discrediting her testimony by plans of having her arrested on marijuana and vehicular equipment charges, to actively planting cocaine upon her person, to ultimately planning her murder and taking steps in furtherance thereof. The seriousness of the plot and the harm planned for the CI escalate contemporaneously with the heat turned on by the government as their investigation furthered. The murder plot hatched in temperal relationship to defendant's grand jury appearance.

[8] When looking at the clandestine tapes and transcripts of them, the only reasonable conclusion I can draw is that the defendant hatched the plans to

discredit the CI and recruited Rudy McIntosh to carry them out. When reviewing part of Exhibit 2, which is a CD/DVD, there are some audiotapes and some combination audio and video tapes on it. That portion that specifically includes the video in which the defendant is told the CI is dead at the bottom of Horseshoe Lake; one can only describe his reaction as one of relief and satisfaction that the CI was dead, with absolutely no remorse. His reaction as the government contends, "screams" defendant's intent to do away with a potential witness against him. Before that point in the chronology of events, the defendant assisted in the murder plot by providing Rudy McIntosh with information about the CI's whereabouts, the type of vehicle she was driving, along with the license tag information, and attempted to find a photograph of her.

A word about Exhibit 17 is in order at this juncture. That is a letter from the defendant to Chief Matthews. Because of the defendant's marred credibility and the fact that the letter was not dated, nor was Chief Matthews called to testify as to when or even if he received it, the Court considers it a rank, self-serving document, likely produced in anticipation of litigation and as a potential defense exhibit and as "cover". Consequently, it's entitled to little or no credence even if it [9] was created within days of the McIntosh tapes.

Because his credibility is suspect, the Court chooses to apply the ordinary meaning rejecting his explanation and definition to defendant's choice of

words including the following: On October 6th of 2004, "I ain't gonna let this bitch get me in trouble on no bullshit." Again on that same date, "Do what we can to take her ass off the street." On October 7 of 2004, he says in response to when asked about how far he wanted the plot to go, "Take it all the way." That same day, "Man, this bitch can do a hundred years." On November 19th, 2004, he uses the "dead as a motherfucker". And later he says, "I want her ass taken out." On November 22nd of 2004, he says, "This bitch ain't worth destroying the lives of everybody in that office; me, you, Charlie, Eddie. You know this is serious shit." Later that same day he says, "I think this girl is the key to everything they is doing." "They" meant the United States Government. On November 23rd of 2004 he says, "done deal," when he is told that he needs to have an alibi that night because the conversation makes it clear the CI was going to be killed then. On November 24 of 2004, the very next day, right after the night that the hit was supposed to take place against the CI and he is told to have an alibi, he responds, "My man", when he is told the CI is dead at the bottom of Horseshoe Lake and shown pictures of the dead CI, and then he remarks "Our problem over."

[10] When reviewed in their totality, the transcripts and videos support, by a preponderance of the evidence, the conclusion that the defendant threatened to cause physical injury to the CI and the 2J1.2(b)(1) enhancement is appropriate.

* * *

§2J1.2. Obstruction of Justice

(a) Base Offense Level: 14

(b) Specific Offense Characteristics

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
PLAINTIFF,	)	**05-30011**
VS.	)	**TO BE FILED UNDER SEAL**
KELVIN ELLIS,	)	
DEFENDANT.	)	

DEFENDANT'S OBJECTIONS TO THE PRE-SENTENCE INVESTIGATION REPORT

Now comes the defendant, Kelvin Ellis, by his counsel John J. O'Gara Jr. and submits the following Objections to the Pre-Sentence Investigation Report dated March 3, 2006. At the outset, Mr. Ellis notes that the Sentencing Guidelines are no longer mandatory, and that the factors listed in 18 U.S.C. 3553(a) must be used by the Court. Mr. Ellis objects, pursuant to the fifth and sixth amendments of the United States Constitution and the holding in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), to the continued use of a Sentencing Guidelines sentence as presumptively reasonable and that he is required to rebut the presumptive guidelines sentence in order to be sentenced to a lesser period of incarceration that that called for in the guidelines. Mr. Ellis asserts that the rebuttable presumption standard held by the Seventh Circuit is precisely

what was proscribed and was held to be unconstitutional in *Blakely*. By placing a burden on the defendant to rebut the sentencing guideline sentence additionally unconstitutionally shifts the burden and also is not enumerated in 18 U.S.C. 3553(a). The defendant nevertheless acknowledges that Under Seventh Circuit case law, the Court must establish the advisory guidelines, and accordingly the defendant submits the following objections:

1. The defendant objects to the Offense Conduct contained in Paragraphs 6-18, of the Pre-Sentence Investigation Report, moves to strike them based on relevance, objects to factual claims regarding an alleged escort service.

2. The defendant objects to the Offense Conduct contained in Paragraph 25 in that Mr. Ellis did not initiate the discussion regarding whether the CI would be killed or should be "dead as a m----f----. This distinction is vitally important, and Mr. Ellis respectfully asks the Court to listen to the entirety of tapes made on the dates listed in Offense Conduct Paragraphs 22-27.

3. Defendant objects to Paragraphs 39 of the Pre-Sentence Investigation Report and submits that the offense at no time involved causing or threatening to cause physical injury to a person. The entire faked death scenario was created, initiated and instigated by Rudy McIntosh and Mr. Ellis did nothing, took no substantial step, or in any way other than acquiesced to McIntosh's injection of "friends" of his who could

take the CI out. No reported cases allow this addition of Specific Offense Characteristic under these circumstances.

4. Defendant objects to Paragraphs 40 of the Pre-Sentence Report, specifically Mr. Ellis denies that he had controlled all aspects of government functions and left the CI without legal recourse. In addition, such claims do not meet the definition of substantial interference with the administration of justice as defined in the Commentary to U.S.S.G. Sec. 2J1.2. A substantial interference "includes a premature or improper termination of a felony investigation: an indictment, verdict or any judicial determination based upon perjury, false testimony or other false evidence; or the unnecessary expenditure of substantial governmental or court resources". In this case, the very act of the obstruction of a witness in the taped sting operation which is the basis of the charge cannot be said to constitute additional substantial interference with the administration of justice.

5. Defendant objects to Paragraph 41 of the Pre-Sentence Report, specifically Mr. Ellis denies that the offense was extensive in scope, planning or preparation. The entire crime is caught on tape – Kelvin Ellis did not take additional steps to commit the crime in this case other than find out a license plate of the CI and, at worst have a city employee help him in determining the license plate number. The tapes, which are the crime, contain no instructions from Mr. Ellis to McIntosh on killing ANYONE. Ellis agrees with McIntosh's suggestion to have his friends take

the CI out. The adjustment under 2J1.2(b)(3)(C) is unwarranted.

6. Defendant objects to Paragraphs 45 and 61 of the Pre-Sentence Report and submits that the Adjusted Offense Level should be 16.

Respectfully submitted,

JOHN J. O'GARA, JR.
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